In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY, and FRED VEGA, individually and on behalf of all others similarly situated; WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,
Respondents.

BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION IN SUPPORT OF ~~RESPONDENTS~~ PETITIONERS

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae Pacific Legal Foundation

Of Counsel:
SANDRA R. JOHNSON
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Subject Index

Table of Authorities Cited

Cases

Codes

Constitutions

Rules

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY, and FRED VEGA, individually and on behalf of all others similarly situated; WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,
Respondents.

BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION IN SUPPORT OF ~~RESPONDENTS~~ PETITIONERS

INTEREST OF AMICUS

This brief *amicus curiae* is respectfully submitted on behalf of *amicus curiae* Pacific Legal Foundation (PLF) pursuant to Supreme Court Rule 42. Consent to the filing of this brief has been granted by counsel for both parties and has been filed with the clerk.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument of the public interest at stake in establishing a standard of proof required for actions alleging violations of 42 U.S.C. § 1981.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals in *Davis v. County of Los Angeles* is reported at 566 F.2d 1334 (9th Cir. 1977).

INTRODUCTION

The facts of this case, as set forth in petitioners' opening brief and herein adopted, raise several important issues. Of these, the issue of the standard of proof required to show discrimination in violation of

42 U.S.C. § 1981[1] is of vital importance with respect to the public interest. The context in which this issue arose was an alleged violation of Section 1981 by the Los Angeles County Fire Department, which used a general aptitude test to screen applicants for firefighter positions with the department. At trial, the plaintiffs presented statistical evidence which showed that this testing procedure had an adverse impact on black and Mexican-American applicants. The district court specifically found that:

> "[n]either the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department." *Davis v. County of Los Angeles,* 8 F.E.P. Cases 239, 241 (C.D. Cal. 1973).

Nonetheless the court concluded that the statistical data alone established a *prima facie* case of racial discrimination which defendants were unable to rebut and ruled in favor of plaintiffs. *Davis v. County of Los Angeles,* 566 F.2d 1334, 1337 (9th Cir. 1977).

This judgment was appealed and the court of appeals affirmed the trial court's findings. However, a rehearing was granted following this Court's decision

---

[1]Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

in *Washington v. Davis,* 426 U.S. 229 (1976), in order to determine whether that case required that plaintiffs show discriminatory motivation or intent in order to make out a *prima facie* case of employment discrimination under Section 1981. On rehearing, the court of appeals held that there was no indication in *Washington v. Davis* that discriminatory intent or motive had to be present in Section 1981 cases. Further, the court again agreed with the district court that statistical evidence of adverse impact upon minorities of the challenged procedures was sufficient to establish a *prima facie* case of employment discrimination under Section 1981.

In holding that under Section 1981, plaintiffs, to make out a *prima facie* case of employment discrimination need only show that the challenged practices have a discriminatory impact on minorities, the court of appeals relied on the standard for burden of proof set forth in Title VII cases (*Griggs v. Duke Power Co.,* 401 U.S. 424 (1971)), and rejected the standard set forth for constitutional cases, *i.e.,* that plaintiffs must show the challenged practices have a discriminatory intent (*Washington v. Davis,* 426 U.S. at 229). Specifically, the court held that "there remains no operational distinction in this context between liability based upon Title VII and Section 1981." *Davis v. County of Los Angeles,* 566 F.2d at 1340.

The significance of the Ninth Circuit Court of Appeals' determination that the Title VII standard of disproportionate impact of challenged practices upon minorities is sufficient to establish a *prima facie* case

of employment discrimination under 42 U.S.C. § 1981 is enormous. Because Section 1981 does not mandate the procedural prerequisites required in Title VII challenges to employment practices, the court's decision foreshadows increased challenges to numerous racially neutral employment procedures. Further, because of the broad sweep of Section 1981 (*see,* for example, *Runyon v. McCrary,* 427 U.S. 160 (1976)), and because of its parallels to the Fourteenth Amendment, this decision has the potential for impact beyond the employment field and for laying the groundwork for challenges to many other neutral private and governmental actions which may be more burdensome to minorities than to others. *Davis v. County of Los Angeles,* 566 F.2d at 1348-50 (dissenting opinion). This possibility was addressed in *Washington v. Davis,* 426 U.S. at 248, in the context of Fifth and Fourteenth Amendment challenges to employment practices and was noted by this Court as a reason for requiring a showing of discriminatory intent to establish a *prima facie* case in these challenges. In effect, by removing this requirement from Section 1981 challenges, the court of appeals has increased dangers which this Court seemingly sought to prevent in *Washington v. Davis.*

Further, were the Ninth Circuit decision allowed to stand, governmental entities (and therefore taxpayers) could be subjected to court imposed heavy monetary penalties without regard to intent to discriminate—or even where the entity has made the maximum affirmative action effort but failed to attain

the "proper" numbers. In addition, the Ninth Circuit ruling could justify the imposition of reverse discrimination quotas in any case of statistical disparity. The imposition of penalties without fault raises substantial questions of violation of due process of law while quotas without fault raise equal protection of the laws questions.

The decision of the court of appeals which raises these issues was apparently taken without an in-depth analysis of either Section 1981 or this Court's ruling in *Washington v. Davis*. Had such an analysis been made, it would be apparent that not only *Washington v. Davis*, but also the legislative history of Section 1981, the differences between Title VII and Section 1981, and the modern scope and usage of Section 1981 all require that the burden of proof for a *prima facie* case of racial discrimination brought under Section 1981 be the same as that for cases brought under the Constitution.

ARGUMENT

THE CONSTITUTIONAL STANDARD OF PROOF MUST BE APPLIED IN ACTIONS ALLEGING VIOLATIONS OF 42 U.S.C. § 1981

A. Actions Brought Under Title VII and Section 1981 Are Separate and Distinct

The court of appeals' holding that Section 1981 actions must parallel those of Title VII and that there is "no operational distinction . . . between liability based upon Title VII and Section 1981" was

apparently based upon reasoning that Section 1981 is a bar to employment discrimination and that this Court "has recognized that Title VII and § 1981 embrace 'parallel or overlapping remedies against discrimination.' *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n. 7 . . . ." *Davis v. County of Los Angeles*, 566 F.2d at 1340.

The fact that Section 1981, as well as Title VII, may be used as a bar to employment discrimination is indisputable. However, the appellate court's reliance on this Court's statement in *Alexander v. Gardner-Denver Company* is misplaced. This Court there stated that: "legislative enactments in this area have long evidenced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 (1974).[2]

This Court made no suggestion that Title VII and Section 1981 are parallel or overlapping, the reference is to Sections 1981 and 1983.[3] However, even if the reference could be construed to apply to Title VII and Section 1981, it cannot stand as precedent for a ruling that the two enactments require the same standards for a *prima facie* case or that there can

---

[2] "*See e. g.*, 42 USC § 1981 (Civil Rights Act of 1866); 42 USC § 1983 (Civil Rights Act of 1871)." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 n.7.

[3] If this reference is to be read to mean that parallel or overlapping remedies must have the same burden of proof, it should be noted that Section 1983, which is specifically mentioned, has been noted to require a showing of discriminatory intent. *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 963-64 (D. Mo. 1977).

be no "operational distinction" between the two. In *Alexander v. Gardner-Denver Company* the reference was made solely in support of a holding that the existence of Title VII does not deny plaintiffs other rights and remedies they may have against discrimination in private employment. In fact this Court continues to point out that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Id.* at 48-49.

Further, in *Johnson v. Railway Express Agency,* 421 U.S. 454, 459-63 (1975), this Court reaffirmed the existence of these supplemental remedies, but pointed out that they are not coextensive. This Court therein concluded its discussion of Title VII and Section 1981 by stating:

> "[T]he remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson,* 421 U.S. at 461.

The dissenting opinion in *Davis v. County of Los Angeles,* 566 F.2d at 1348, cogently points to the fallacy of the majority's reasoning when it observes:

> "That both statutes [Section 1981 and Title VII] can apply to the same facts and that both may afford similar remedies is beside the point. The same can be said of Title VII and the Fourteenth Amendment, yet, after *Washington v. Davis,* there remains an essential 'operational distinction' between them."

This distinction between Title VII and Section 1981 manifests itself when the scope of the two statutes is studied. Title VII was enacted in 1964 to deal with discrimination in employment. The Court, in addressing the purpose of this statutory remedy, has stated:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of *employment opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.,* 401 U.S. at 429-30 (emphasis added).

Section 1981 is not so limited to one area of discrimination, nor was it intended to achieve a narrow goal. The purpose of the Civil Rights Act of 1866 from which Section 1981 is derived has been described by this Court: "to secure to all citizens of every race and color, and without regard to previous servitude, those *fundamental rights which are the essence of civil freedom.*" *Civil Rights Cases,* 109 U.S. 1, 22 (1883) (emphasis added).

Viewing the two statutes in comparison, convergent only in the area of employment discrimination and widely divergent in all other areas of discrimination, it is difficult to imagine how the same standard of proof could be applicable to both. Even in the narrow area of employment, these two remedies for the same ill may be parallel and overlapping without operating identically. Certainly, because of the proce-

dural prerequisites involved under Title VII, every plaintiff who meets Section 1981 standards, even as the court of appeals describes them, would not be able to bring a successful Title VII suit. (*See Johnson v. Railway Express Agency,* 421 U.S. at 460.)

These procedural prerequisites of Title VII suits, including the exhaustion of administrative remedies, "tend to eliminate claims that are frivolous or suffering from obvious legal or factual defects [and] it is not unreasonable to provide that a *prima facie* case may be established without a showing of discriminatory intent." *Davis v. County of Los Angeles,* 566 F.2d at 1350 (dissenting opinion). Fourteenth Amendment actions lack the procedural protections against obviously defective cases; however, protection is provided by the requirement of proof of discriminatory motivation behind challenged practice before a *prima facie* case can be established. If Section 1981 is interpreted in the manner set forth by the Ninth Circuit, cases brought under this section will have neither of the screening devices of Title VII and the Fourteenth Amendment. This factor standing alone is sufficient to require that Section 1981 standards of proof parallel those of the Fourteenth Amendment. In addition, because of the fact that Section 1981 actions are extremely similar to those of the Fourteenth Amendment and in light of the fact that this Court has already prescribed the standards for the Fourteenth Amendment in *Washington v. Davis,* there is ample indication that discriminatory motivation must be part of the *prima facie* case under Section 1981. Were this not the case:

> "In the vast array of cases such as the one before us now and *Washington v. Davis* itself, where Title VII does not apply but Section 1981 and the Fourteenth Amendment do, one could easily avoid the intent requirement of the Amendment by simply pleading section 1981." *Davis v. County of Los Angeles,* 566 F.2d at 1350 (dissenting opinion) (footnote omitted, citation omitted).

It appears quite likely that this Court itself considered this problem in *Washington v. Davis* when it indicated that the extension of Title VII standards beyond Title VII must await specific legislative action. *Id.* at 248.

B. The History of Section 1981 Mandates a Constitutional Standard of Proof

Justice Stevens, concurring in *Washington v. Davis,* 426 U.S. at 255, stressed the impropriety of transplanting Title VII standards into another statute without an examination of that statute's legislative history. Similarly, the dissent in *Davis v. County of Los Angeles* indicated:

> "The proper inquiry is whether the legislative history of Section 1981 indicates that it should track the Fourteenth Amendment's standards of proof rather than those of Title VII. I believe that the history of Section 1981 strongly suggests precisely that." *Id.* at 1348.

The history of Section 1981 does more than suggest that Section 1981 tracks the Fourteenth Amendment. It suggests that it was the direct progenitor of the Fourteenth Amendment.

The Thirteenth Amendment was ratified and adopted in December of 1865 abolishing slavery and involuntary servitude. Further, it granted to Congress the power to make its provisions effective by appropriate legislation. Thirteenth Amendment, Section 2. Under the auspices of this power of enforcement, the legislature enacted the Civil Rights Act of 1866 securing "[t]o all persons within the United States practical freedom." *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 431-32 (1968), *quoting from,* 39th Cong., 1st Sess. 43, 474-75. The "practical freedom" guaranteed by this Act was the right to make and enforce contracts; the rights to buy, sell, and own realty and personalty; the right to sue, be parties, and give evidence; and the right to full and equal benefit of all laws and proceedings for the security of persons and property. E. Gressman, *The Unhappy History of Civil Rights Legislation,* 50 Mich. L. Rev. 1323, 1326 (1952) (hereinafter *History*).

Because of the extent of controversy over the constitutionality of this Act, some adverse court decisions, and the feeling by some advocates of the Act that it should be placed beyond the power of subsequent congressional action, the provisions of the Civil Rights Act of 1866 were cast in the mold of a new constitutional provision, the Fourteenth Amendment. *History* at 1328-29. Congressional speakers addressing the purpose of Section 1 of the Fourteenth Amendment made it quite plain that it was designed to make certain that the Civil Rights Act of 1866 was constitutionally valid (*History* at 1331), and a comparison between the language of Section 1 of the Fourteenth Amendment and

the Civil Rights Act of 1866 demonstrates that this constitutionality was guaranteed by enacting the Civil Rights Bill into the Constitution itself. Further indications of this equality between amendment and statute are found in the language making all citizens born or naturalized in the United States "citizens of the United States and of the State wherein they reside," found in the Fourteenth Amendment and drawn from the 1866 Act. Additionally, the "privileges and immunities clause" also was drawn from the Act. *History* at 1333.

The Fourteenth Amendment was subsequently ratified on July 28, 1868, and on May 31, 1870, a new Civil Rights Act was passed. This statute was a reenactment of the 1866 Act "under the belief that whatever doubts may have previously existed as to constitutional validity were now removed by the Fourteenth Amendment." *History* at 1333-34. (*See also United States v. Wong Kim Ark,* 169 U.S. 649, 674-76 (1898).) The language of Section 1981, the modern codification of the Civil Rights Acts of 1866 and 1870, still contains most of the original language and still vindicates "those fundamental rights which appertain to the essence of citizenship." *Civil Rights Cases,* 109 U.S. at 22.

The import of the history of Section 1981 is obvious. This history shows that the Fourteenth Amendment and Section 1981 share not only a common heritage, but common language and purpose as well. These factors strongly suggest that actions brought under Section 1981 and the Fourteenth Amendment must be treated in a similar manner and that the burden of

proof for a *prima facie* case under each must be the same.

Even apart from the genealogical connection with the Fourteenth Amendment, an examination of Section 1981 alone indicates that discriminatory motivation must be shown in order to indicate a statutory violation. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court explored the language and history of the Civil Rights Act of 1866 in order to determine whether Section 1982 applied to private actions. After examining the 1866 Act, the Court indicated:

> "[T]he structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit *all* [emphasis in original] racially *motivated* [emphasis added] deprivations of the rights enumerated in the statute, although only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2." *Id.* at 426.

Although it is recognized that this statement in *Jones v. Alfred H. Mayer Co.* is *dicta* on the issue of discriminatory intent under the 1866 Act: "it is an expression of the Court's reading of the statute" (*Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 964-65 (D. Mo. 1977)), and significant in this case since Section 1981, like Section 1982, is derived from Section 1 of the Civil Rights Act of 1866. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-23, n.28. This reading of the statute, when combined with its relationship to the Fourteenth Amendment, demonstrates that discriminatory intent behind challenged actions is a prime ingredient of a *prima facie* case brought under Section 1981.

C. The Scope of Section 1981 Dictates a Showing of Discriminatory Intent

In assessing the dangers of applying Title VII discriminatory impact standards in constitutional cases, the Court in *Washington v. Davis*, 426 U.S. at 248, observed:

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."

Although this comment is directed to cases brought under the Fifth or Fourteenth Amendments, it is also applicable to potential problems should the showing of discriminatory intent requirement be abandoned in Section 1981 cases.

While it is true that the case at bar goes no further than dispensing with proof of discriminatory intent in Section 1981 public employment cases (*Davis v. County of Los Angeles*, 566 F.2d at 1340), Section 1981, like the Fifth and Fourteenth Amendments, extends far beyond the public employment field and is available as a remedy in a multiplicity of cases when public or private discrimination based upon race is alleged.[4] The

[4]Section 1981 has been held to prevent discrimination: in the admittance to hospitals (*United States v. Medical Society of South Carolina*, 298 F. Supp. 145 (D.S.C. 1969); in the activities of labor unions (*Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 993 n.26 (D.D.C. 1973)); in access to libraries (*see Kerr v.*

Ninth Circuit's holding foreshadows an end to proof of discriminatory intent in all these cases. Such a holding is fraught with the same dangers which this Court sought to avoid in *Washington v. Davis*[5] and with the additional dangers inherent in the fact that Section 1981, unlike the Fifth and Fourteenth Amendments, can be utilized to challenge private as well as public actions.

An example of the problems which might arise is given by *Jefferson v. Hackney,* 406 U.S. 535 (1972). In that case, bare statistical evidence revealed that there was an adverse impact upon black and Mexican-American recipients of Aid to Families with Dependent Children (AFDC) created by a Texas constitutional provision placing a ceiling on the amount which could be spent on welfare assistance grants. Because this constitutional ceiling was insufficient to grant the full amount to all welfare assistance recipients, the state reduced, by a certain percentage, the amount of grants

Enoch Prutt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945), *cert. denied,* 326 U.S. 721 (1945)); in access to private schools (*Runyon v. McCrary,* 427 U.S. 160, 173-74 (1976)); and in the right to equal service in restaurants (*Hernandez v. Erlenbusch,* 368 F. Supp. 752, 755 (D. Ore. 1973)).

[5]Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 Calif. L. Rev. 275, 300 (1972), cited by this Court in *Washington v. Davis,* 426 U.S. 229, 248 n.14 (1976), indicates that neutral tests and qualifications for government conferred benefits and opportunities, such as voting, draft deferment, public employment, and jury service, would be invalidated by a discriminatory impact test under the Fourteenth Amendment. Also open to challenge would be "[s]ales taxes, bail schedules, utility rates, bridge tolls, license fees and other state imposed charges [which] are more burdensome to the poor than to the rich, and hence more so to the average black than to the average white." Most, if not all of these, would be challengeable under Section 1981 as well as the Fifth or Fourteenth Amendments.

under the various programs. The largest reduction was in the AFDC area which, coincidentally, had the highest number of minority recipients.

The plaintiffs argued that such an action deprived them, among other things, of their constitutional rights under the Fourteenth Amendment. This Court noted that statistical inequalities did not automatically result in invidious racial discrimination and observed:

> "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive." *Jefferson,* 406 U.S. at 548.

It was thus held that plaintiffs could not prevail in their Fourteenth Amendment challenge since the reduction classifications were rational. The quote above embodies reasoning similar to that elucidated in *Washington v. Davis,* 426 U.S. at 248.

Had the plaintiffs in *Jefferson* presented a Section 1981 claim, and this section were to be construed as suggested by the Ninth Circuit, it is possible that plaintiffs while failing on their Fourteenth Amendment claim could have succeeded on their Section 1981 claim. The fears expressed by this Court in *Jefferson* would then have been realized, and indeed could yet be realized if new claims, which could be based on the Fourteenth Amendment or Section 1981, are brought under Section 1981 alone.

D. Washington v. Davis and Federal Court Decisions Construing Washington v. Davis Indicate that Section 1981 Requires a Constitutional Standard of Proof

In *Davis v. County of Los Angeles,* 566 F.2d at 1340, the court of appeals read *Washington v. Davis* as having no bearing on the Section 1981 claims involved in this case. Because of the parallels between Section 1981 and the Fourteenth Amendment, discussed above, it is submitted that this reasoning is incorrect. However, it also submitted that it is erroneous in that this Court in *Washington v. Davis* appears to have implicitly decided the Section 1981 question.

In *Washington v. Davis,* plaintiffs-respondents challenged employment practices on both constitutional (Fifth Amendment) and statutory (Section 1981 and District of Columbia Code § 1-320) grounds and asserted, among other things, that a preemployment test was invalid insofar as it had a discriminatory impact on black applicants. The case below was heard on motions for summary judgment with all the parties and courts assuming that Title VII standards regarding burden of proof applied, *i.e.,* all that was necessary for a plaintiff to make out a *prima facie* case of employment discrimination was a showing of discriminatory impact of the challenged practices. This Court disagreed with that assumption. Although the Court primarily discussed the inapplicability of Title VII standards of proof for a *prima facie* case of discrimination in constitutional cases, it observed that "[r]espondents were entitled to relief on neither constitutional nor statutory grounds." *Washington v.*

Davis, 426 U.S. at 248. The Court then proceeded to uphold the judgment of the district court which had granted defendant-appellants' motion for summary judgment. This motion had asserted that plaintiffs were entitled to relief on neither statutory nor constitutional grounds. *Id.* at 234.

In his concurring opinion Justice Stevens states his view that the Court's ruling regarding the inapplicability of Title VII standards applied to Section 1981 claims as well as those based on the Constitution:

> "Since the Court of Appeals set aside the portion of the District Court's summary judgment granting the defendants' motion, I agree that we cannot ignore the statutory claims even though, as the Court makes clear, ante, at 238 n 10, there is no Title VII question in this case. The actual statutory holdings are limited to 42 USC § 1981 and § 1-320 of the District of Columbia Code, to which regulations of the Equal Employment Opportunity Commission have no direct application." *Id.* at 255.

When Justice Stevens' observations are read along with the holding of the majority, it is apparent that the Court was extending its constitutional ruling to include Section 1981. This conclusion is eminently logical when it is noted that Section 1981 parallels and guarantees constitutional rights similar to those of the Fourteenth Amendment.

Further, as discussed above, this Court clearly evidenced its concern in regard to the consequences which could follow if Fourteenth Amendment chal-

lenges to practices affecting the races unequally were allowed to go forward without a showing of discriminatory intent. *Washington v. Davis,* 426 U.S. at 248. After assessing these consequences, the Court continued:

> "[I]n our view, extension of the rule [that a statute designed to serve neutral ends is invalid if it benefits one race more than another] beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription." *Id.*

This strongly suggests that the Court wished to confine the Title VII standards solely to Title VII proceedings or those future situations in which the standards had been specifically authorized by the legislature. Actions under Section 1981 do not fall into this category.

It is significant to note that, following *Washington v. Davis,* a number of federal courts, including the Third, Seventh, and Eighth Circuits,[6] have indicated that that case necessitates a showing of intentional discrimination for a *prima facie* case under Section 1981. In *Arnold v. Ballard,* 448 F. Supp. 1025 (N.D. Ohio 1978), which was remanded to the district court specifically for reconsideration in light of *Washington v. Davis,* the court expressly rejected the reasoning of *Davis v. County of Los Angeles* and held:

---

[6]*Resident Advisory Bd. v. Rizzo,* 564 F.2d 126 (3d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3541 (1978); *City of Milwaukee v. Saxbe,* 546 F.2d 693 (7th Cir. 1976); *Johnson v. Alexander,* ..... F.2d ....., 16 F.E.P. Cases 894 (8th Cir. 1978).

> "The legislative history of section 1981, prior Supreme Court opinions dealing with the Civil Rights Act of 1866, e. g., *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), and *Washington v. Davis* can be harmonized only by a holding that proof of discriminatory purpose is required for employment discrimination claims under section 1981." *Ballard,* 448 F. Supp. at 1028.

Such a holding appears eminently logical and correct.

CONCLUSION

The Ninth Circuit Court of Appeals decision that a showing of adverse impact is sufficient to make out a *prima facie* case of employment discrimination under Section 1981 is seriously deficient. It made no search of the history of Section 1981. It failed to note the different nature and scope of Section 1981 and Title VII. Most seriously it failed to comprehend the purpose of the requirement of a showing of intent in constitutional challenges to discriminatory practices.

Intentional racial discrimination should never be condoned. However, whenever discrimination is charged, it is necessary to ensure that the rights of all parties are protected and that innocent people are not, themselves, discriminated against. The means of ensuring that these rights *are* protected is by requiring the showing of discriminatory intent or moti-

vation. In light of this and for the reasons set forth above, *amicus curiae* Pacific Legal Foundation urges this Court to find that 42 U.S.C. § 1981, like its constitutional analogs, the Thirteenth and Fourteenth Amendments, requires a showing of discriminatory intent or motivation.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Attorneys for Amicus Curiae
Pacific Legal Foundation

Of Counsel:

SANDRA R. JOHNSON

September, 1978